(2)

No. 90-583

In The

Supreme Court of the United States

October Term, 1990

BAXTER CHRYSLER PLYMOUTH, INC.,

and

JOHN MARKEL, INC., d/b/a
MARKEL FORD, et al.

and

JOHN KRAFT CHEVROLET, INC.,
d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.

and

STAN OLSEN PONTIAC, INC., d/b/a OLSEN AUTO WORLD AND OLSEN FAMILY DISCOUNT CENTER,

Petitioners,

vs.

THE STATE OF IOWA, ex rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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QUESTIONS PRESENTED

I. WHETHER OMAHA, NEBRASKA MOTOR VEHICLE DEALERS ARE SUBJECT TO THE PERSONAL JURISDICTION OF IOWA COURTS BASED ON THEIR ADVERTISEMENTS IN A NEWSPAPER WITH SUBSTANTIAL IOWA CIRCULATION, ON A TELEVISION STATION BROADCAST INTO IOWA, AND IN THE COUNCIL BLUFFS, IOWA TELEPHONE BOOK.

II. WHETHER IOWA STATE COURTS HAVE SUBJECT MATTER JURISDICTION OVER CLAIMS BROUGHT PURSUANT TO THE CREDIT ADVERTISING PROVISIONS OF THE IOWA CONSUMER CREDIT CODE AND THE IOWA CONSUMER FRAUD ACT.

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The Respondent, State of Iowa, respectfully suggests that the petition for certiorari be denied.

OPINION BELOW

The Iowa Supreme Court decision was filed May 23, 1990, and is reprinted in "Appendix A" to the petition. It is reported as *State v. Baxter Chrysler-Plymouth, Inc., et al.*, 456 N.W.2d 371 (Iowa 1990). That court, sitting en banc, denied Baxter Chrysler-Plymouth's petition for rehearing on June 20, 1990. That Order is reprinted in "Appendix B" to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the following provisions of federal law which were not included in the Petition.

15 U.S.C. § 1610(a)(1). Effect on other laws. Inconsistent provisions; procedures applicable for determination.

(a)(1) This part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. Upon its own motion or upon the request of any creditor, State or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any such inconsistency exists. If the Board determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and shall incur no liability under the law of that State for failure to use such term or form, notwithstanding that

such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(March 31, 1980, 94 Stat. 173.)

15 U.S.C. § 1667c. Consumer lease advertising; liability of advertisers.

(a) No advertisement to aid, promote, or assist directly or indirectly any consumer lease shall state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at inception of the lease unless the advertisement also states clearly and conspicuously and in accordance with regulations issued by the Board each of the following items of information which is applicable:

(1) That the transaction advertised is a lease.

(2) The amount of any payment required at the inception of the lease or that no such payment is required if that is the case.

(3) The number, amounts, due dates or periods of scheduled payments, and the total of payments under the lease.

(4) That the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability.

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time.

(b) There is no liability under this section on the part of any owner or personnel, as such, of any medium, in which an advertisement appears or through which it is disseminated.

(Pub.L. 90-321. Title I, § 184, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 259.)

STATEMENT OF THE CASE

This case originated as five separate civil actions filed by the respondent, the State of Iowa, by Attorney General Thomas J. Miller, against various Omaha, Nebraska motor vehicle dealerships and their corporate presidents. The State alleged that the dealers' advertisements in the *Omaha World Herald* newspaper were deceptive and misleading and, therefore, violated the Iowa Consumer Fraud Act, Iowa Code § 714.16. The State also alleged that several of the same advertisements violated the credit advertising provisions of the Iowa Consumer Credit Code, Iowa Code Chapter 537. The advertisements were contained in the "Iowa Edition" of the *Omaha World Herald*, a newspaper sold, distributed, and delivered to Iowans in Iowa.

The actions were originally filed in the Iowa District Court in Council Bluffs, across the Missouri River from Omaha. Thereafter, the dealers filed removal petitions to the federal court in Iowa. The State responded with motions to remand, arguing lack of federal diversity and subject matter jurisdiction. The dealers resisted the State's motions to remand and filed motions to dismiss

for lack of personal jurisdiction. The cases were then consolidated.

In an order dated July 12, 1988, the Honorable Donald E. O'Brien, United States District Court Judge, granted the State's motions to remand, finding a lack of federal diversity and federal subject matter jurisdiction. The federal court did not issue a ruling on the dealers' motions to dismiss for lack of personal jurisdiction. The July 12, 1988 order is reprinted in "Appendix C" to the petition. On December 23, 1988, the federal court denied the dealers' motion to reconsider the July 12, 1988 ruling. The December 23, 1988 order is reprinted in "Appendix M" to this brief.

Upon remand to the Iowa district court, the dealers filed separate motions to dismiss for lack of personal and subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The cases were consolidated. In an order of April 6, 1989, the Iowa district court granted the dealers' motions to dismiss for lack of personal jurisdiction. Contrary to the dealers' assertion in the petition, however, the Iowa district court made no ruling regarding the dealers' motions to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. The Iowa district court's order of April 6, 1989 is reprinted in "Appendix D" to the petition.

The State appealed the dismissal of the actions to the Iowa Supreme Court. The Supreme Court reversed the district court, holding that the dealers' advertisements in the *Omaha World Herald*, a newspaper delivered to the homes of Iowa residents and sold at retail locations in

Iowa, and the dealers' advertisements in the U.S. West Yellow Pages telephone book directory for Council Bluffs, Iowa constituted sufficient minimum contacts with the State of Iowa to support the exercise of personal jurisdiction over the corporate defendants. The Court further held that the finding of sufficient minimum contacts was particularly appropriate in these cases in that the State's causes of action were based solely on the dealers' contacts with Iowa, their advertisements. However, the Supreme Court affirmed the dismissals as to the corporate president defendants. The dealers' motion for a rehearing was denied by the Iowa Supreme Court on June 20, 1990. Thereafter, one of the five defendants, Dean Rawson Nissan, Inc., withdrew from the lawsuit and entered into a consent judgment with the State.

SUMMARY OF ARGUMENT

The decision of the Iowa Supreme Court is consistent with the decisions or this Court, federal appellate and district courts, and state appellate courts. The Iowa contacts of these motor vehicle dealerships are sufficient to subject them to the personal jurisdiction of Iowa courts. The causes of action alleged by the State are based solely on the dealers' advertisements in the *Omaha World Herald* newspaper and on a television station broadcast into Iowa. The dealers' advertisements appear on almost a daily basis in editions of the newspaper which are delivered to the homes of Iowa residents in the Omaha-Council Bluffs metropolitan area and in other parts of Iowa via home deliveries of the "Iowa Edition" of the newspaper. More than eleven per cent of the total circulation of the

newspaper is to Iowa residents. Considering only the Sunday circulation of the *Omaha World Herald* into Iowa, each of the dealerships has in excess of 1.7 million separate contacts per year with Iowa residents. The dealers also each advertise in the Council Bluffs, Iowa Yellow Pages telephone directory.

The dealers' efforts to serve the Iowa market through their advertisements in Iowa, and their location in a metropolitan area that is comprised, in part, of Iowa residents, are such that the dealers can reasonably anticipate being haled into court in Iowa, *particularly* for actions concerning those very advertisements. The writ should be denied under Supreme Court Rule 10 since the Iowa Supreme Court's decision is consistent with the holdings of this Court and because there are no special or important reasons for the exercise of judicial discretion in granting the writ.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE IOWA CONTACTS OF THESE MOTOR VEHICLE DEALERSHIPS ARE SUFFICIENT TO SUBJECT THEM TO THE PERSONAL JURISDICTION OF IOWA COURTS; THE DECISION OF THE IOWA SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT, FEDERAL APPELLATE AND DISTRICT COURTS, AND STATE APPELLATE COURTS.

The Iowa Supreme Court recognized that a state may only exercise jurisdiction over a nonresident defendant consistently with the due process clause of the fourteenth

amendment if that defendant has certain "minimum contacts" with the forum state. *State v. Baxter Chrysler-Plymouth, Inc., et al.*, 456 N.W.2d 371, 375 (Iowa 1990). The State need only allege a prima facie case for jurisdiction. *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 453 (8th Cir. 1984).[1] The State has alleged facts in each petition sufficient to constitute a prima facie finding of jurisdiction over these dealers.

A. THESE DEALERS SEEK TO SERVE THE IOWA MARKET DIRECTLY.

The Iowa Supreme Court relied on this Court's holding in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-299 (1980), that sufficient minimum contacts over a foreign defendant can be established based on efforts by the foreign defendant to directly or indirectly seek to serve a market in the forum state.[2] 456 N.W.2d at 375.

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[1] The dealers have misstated the court's holding in *Golden State Strawberries*. The State is not required to "plead and prove" jurisdiction.

[2] This Court has consistently applied this analysis in cases subsequent to *World-Wide Volkswagen*, most recently in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). In *Asahi*, a majority of the Court held that it would offend "traditional notions of fair play and substantial justice" to subject a Japanese company to the personal jurisdiction of California courts in that no California parties remained in the action. *Id.* at 113-116. However, the Court, via separate plurality opinions, held that states have personal jurisdiction of non-resident defendants who directly or indirectly seek to serve a market in the forum state.

(Continued on following page)

In *World-Wide Volkswagen*, a New York resident who purchased a car from a New York auto dealer had an accident with the car in Oklahoma and sued the dealer, manufacturer, and others for an allegedly defective design and placement of the car's fuel system. In holding that the defendant manufacturers did not have sufficient minimum contacts and could not reasonably anticipate being haled into Oklahoma state court, the Court relied on the fact that the manufacturers and their dealer-retailers did not directly or indirectly seek to serve the Oklahoma market. Their only contacts were through the unfortunate circumstance of a car the dealer sold being involved in an accident while passing through Oklahoma. 444 U.S. at 295-299.[3]

In *World-Wide Volkswagen*, the Court found that Oklahoma was not part of the defendant's market area. 444 U.S. at 298. Here, the dealers are separated by only a few hundred yards of water from the forum state, unlike the hundreds of miles that separated the defendant from Oklahoma in *World-Wide Volkswagen*. The dealers chose to

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Id. at 112, 121. The Justices joining in Justice O'Connor's plurality opinion held that advertising in the forum is sufficient. *Id.* at 112. The Justices joining in Justice Brennan's plurality opinion held that the defendant's knowledge that its product was part of another product being marketed in the forum state constituted sufficient minimum contacts. *Id.* at 121.

[3] Contrary to the dealers' assertion in their petition, the Court in *World-Wide Volkswagen* did not draw a distinction between manufacturer contacts and retailer contacts for the purposes of this analysis. The Iowa Supreme Court drew no such distinction in its opinion.

place advertisements in the metropolitan and "Iowa" editions of the Omaha newspaper and large block advertisements and listings in the Council Bluffs, Iowa, telephone directory in their self-directed efforts to reach and serve the Iowa market.

In a case nearly identical to the cases before this Court, the Supreme Court of Alabama held that a Stone Mountain, Georgia motor vehicle dealer had sufficient minimum contacts with the State of Alabama based upon the dealer's advertisements in Atlanta, Georgia and Gwinnet County, Georgia newspapers and on Atlanta television stations. *Ex parte Pope Chevrolet, Inc. (Re Emmie Wallace v. Pope Chevrolet, Inc., et al.)*, 555 So.2d 109, 113-114 (Ala. 1989).[4] The court held that the dealer's advertisements in Georgia media constituted sufficient minimum contacts with the state of Alabama even though the dealer did not aim its advertising at Alabama residents. 555 So.2d at 113-114. Just as the Iowa Supreme Court did in *Baxter*, the Alabama court correctly reasoned that the dealer's advertisements in out-of-state media which also served the forum state showed that the dealer was soliciting sales in the forum.[5] 555 So.2d at 114.

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[4] *Ex parte Pope Chevrolet, Inc.*, involved an action in an Alabama state court by an Alabama resident against the Georgia dealer alleging fraud and breach of contract in her purchase of a pick-up truck from the Georgia dealer. 555 So.2d at 109-110.

[5] On page 11 of the dealers' petition they state that the Respondent is relying, in part, on *Gunner v. Elmwood Dodge, Inc.*, 506 N.E.2d 175 (Mass. 1987). The State did not cite this case to the Iowa Supreme Court, nor is it relying on this case now.

B. THE CAUSES OF ACTION ALLEGED ARE DIRECTLY RELATED TO THE DEALERS' CONTACTS.

The State alleged that the dealers' regular advertisements and solicitations in a newspaper sold, distributed, and delivered to Iowans in Iowa, violated Iowa laws regarding credit term advertising and deceptive advertising. These same advertisements are the bases for finding jurisdiction over the dealers in Iowa.

In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, nn. 8, 9 (1984), this Court drew a distinction between "general" and "specific" contacts with the forum state.[6] In *Helicopteros*, the Court stated that in "specific jurisdiction" cases the plaintiff need only allege a "relationship among the defendant, the forum, and the litigation," for the forum state to exercise personal jurisdiction over a foreign defendant. 466 U.S. at 414. However, in cases involving "general jurisdiction," the plaintiff must make a showing that the defendant had continuous and systematic contacts with the forum state. 466 U.S. at 415-416. More contact is required with the forum state in "general jurisdiction" cases because the state has no

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[6] When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. 466 U.S. at 414, n. 8. When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State is exercising "general jurisdiction" over the defendant. *Id.*, n. 9.

direct interest in the cause of action. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987).

The claims asserted against these dealers arise solely out of, or relate to, the dealers' contacts with the forum. The State is only required to allege that the dealers purposefully directed their advertisements to Iowans and that these advertisements caused harm in Iowa. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-476 (1985).

"Specific jurisdiction" may be found to exist where the defendant has only one contact with the forum state if the cause of action is directly related to that contact. *Burger King*, 471 U.S. at 475, n. 18. The State has alleged facts sufficient for Iowa courts to possess "specific jurisdiction" over the dealers. The State has alleged that the advertisements harmed Iowans because they were deceptive and misleading in violation of the Iowa Consumer Fraud Act and the Iowa Consumer Credit Code.

C. THE OMAHA DEALERS' CONTACTS WITH IOWANS ARE PERSISTENT AND NUMEROUS.

The dealers' advertisements were regularly disseminated to Iowans. The dealers advertised on an almost daily basis in the metropolitan edition and in the "Iowa Edition" of the *Omaha World Herald*, a large metropolitan newspaper which is delivered to the homes of, and read by, substantial numbers of Iowans.[7]

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[7] Sales of the Sunday *Omaha World Herald* in Iowa represent 11.5% of all sales of that edition of the newspaper.

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The metropolitan edition of the newspaper is received by residents in the Omaha-Council Bluffs metropolitan area, including residents of Pottawattamie County, Iowa. Omaha, Nebraska and Council Bluffs, Iowa are separated only by the Missouri River. Together they constitute one metropolitan area.[8] The "Iowa Edition" of the *Omaha World Herald* is delivered and sold to Iowans living in Iowa, outside of the Omaha-Council Bluffs metropolitan area. The "Iowa Edition" is geared towards Iowans in that it contains many Iowa news stories.

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(Appendix N to this brief, pages 6a-7a.) Approximately 28% of all Council Bluffs, Iowa households received home delivered subscriptions of the Sunday *Omaha World Herald* during 1987. In December, 1987, there were 5,700 home delivered subscriptions of the Sunday *Omaha World Herald* in the city of Council Bluffs which has, according to the Council Bluffs Chamber of Commerce figures, 21,060 households. (Appendix K to the petition, pages 121a and 122a.) Contrary to the dealers' assertion in their petition, the Iowa district court did not find that circulation of the *Omaha World Herald* into Iowa constituted less than 2% of the total circulation of the newspaper. A review of the district court's opinion reveals that the Court merely stated that this was the percentage of the circulation of the newspaper into Council Bluffs, Iowa, not into the entire State of Iowa. (Appendix D to the petition, page 35a.)

[8] Council Bluffs, Iowa, and Omaha, Nebraska compose a Standard Metropolitan Statistical Area, a U.S. Census Bureau term, which is defined as "a large population nucleus and nearby communities which have a high degree of economic and social integration with that nucleus." (See: U.S. Department of Commerce, Bureau of the Census, *1980 Census of Population and Housing, Users' Guide*, Part B. Glossary (November, 1982)).

Every time a copy of the *Omaha World Herald* containing a disputed advertisement is sold in Iowa, that sale is a separate contact by the advertising dealer with the State of Iowa.[9] Considering only their advertisements in the Omaha World Herald, the dealers' contacts with Iowa are numerous.

In addition, residents of Pottawattamie County, Iowa, watch Omaha television stations which report the news of the two-state metropolitan area. The only television stations which serve the Omaha-Council Bluffs metropolitan area are Nebraska stations. The State alleged that the advertisements of Baxter Chrysler-Plymouth, Inc. on an Omaha television station violated Iowa law. Each time a person in Iowa views a television advertisement by one of these dealers, the viewing constitutes a separate Iowa contact by that dealer.

Each of the dealerships chose to advertise in the U.S. West Direct Yellow Pages Directory for Council Bluffs, Iowa. Two of the dealerships, Baxter Chrysler-Plymouth, Inc. and Olsen's Auto World, have large block advertisements in the Directory. Advertisements placed by foreign defendants in Yellow Page Directories within the forum

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[9] Assuming that each defendant advertised in the *Omaha World Herald* newspaper each Sunday, each defendant would have fifty-two yearly contacts with every Iowa resident that subscribed to the Sunday edition of the newspaper. The total circulation in Iowa of the Sunday edition of the Iowa and metropolitan editions of the *Omaha World Herald*, as of March, 1989, was 33,124. (Appendix N to this brief, page 6a.) Therefore, each defendant has 1,722,448 contacts with Iowa residents every year, considering only the defendants' advertisements in the Sunday edition of the Omaha newspaper.

state have been held by a federal district court to constitute "contacts" with the forum state. *Hayworth v. Beech Aircraft Corp.*, 690 F. Supp. 962, 965 (D. Wyo. 1988). Each copy of the Yellow Pages Directory that is provided to an Iowan, and containing a listing for one of these dealers, constitutes a separate contact by that dealer with the State of Iowa.

The dealers did not, nor can they deny that their newspaper, television, and Yellow Pages advertisements reached the Iowa market and were read or viewed by Iowans. The dealers' contacts with Iowa are sufficiently persistent and numerous to subject them to the personal jurisdiction of Iowa courts.

D. THE CIRCULATION OF THE DEALERS' MISLEADING ADVERTISEMENTS IN IOWA SUBJECTS THEM TO IOWA JURISDICTION.

This Court has found sufficient minimum contacts with the forum state where the advertising of a foreign defendant was circulated in the forum state. In *Calder v. Jones*, 465 U.S. 783 (1984), the defendants were Florida residents who wrote an allegedly libelous article about the California plaintiff in a publication with a national circulation. While the defendants had few contacts with California, the Court found that California had personal jurisdiction of the defendants because their intentional conduct in writing the article was calculated to have effect in California. *Id.* at 789-790. The Court held that, although the defendants in *Calder* did not control the circulation of the magazine, they could reasonably anticipate being haled into California courts. *Id.*

The determination of whether a defendant has engaged in "wrongdoing intentionally directed at" a resident of the forum state, as found in *Calder, Id.* at 790, is not to be narrowly construed. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court held that New Hampshire courts possessed personal jurisdiction over an Ohio corporation with its principal place of business in California in a libel action filed by a New York resident against the defendant based upon the contents of the magazine published by the defendant. The Court reasoned that, although the defendant's only contact with New Hampshire was to sell 14,000 copies of its magazine in New Hampshire, "regular monthly sales of thousands of magazines [in the forum state] cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous," and New Hampshire jurisdiction based upon those contacts satisfied the requirements of the due process clause. 465 U.S. at 774-775.

The Court further reasoned that states have an interest in redressing injuries which occur within their borders, and because false statements of fact in a publication harm the readers of those statements, states may employ their libel laws to discourage deception of their citizens, regardless of the residence of the defendant. *Id.* at 776-778.

Under *Calder* and *Keeton*, a nonresident defendant who distributes libelous publications in a forum state is subject to personal jurisdiction in the forum state so long as the distribution of those publications in the forum is not a "random, fortuitous, or isolated" event. Although *Calder* and *Keeton* involved libel actions, the analysis applied by the Court in those cases is, at a minimum,

applicable to actions based upon fraud. Both involve false statements and both are, for some purposes, considered to be torts. *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981); W. Prosser and W. Keeton, *Handbook of the Law of Torts*, § 105 (5th Ed. 1984); Restatement (Second) of Torts § 525 (1977).

The dealers intend that their advertisements be read and viewed by Iowans. The dealers presumably are also aware that false statements made in their advertisements will harm Iowans. The State has alleged that these advertisements contained unlawful and misleading statements and that such statements have harmed Iowa residents. The dealers' advertisements were not random, fortuitous, or isolated. *Calder* and *Keeton* confirm that these dealers have sufficient minimum contacts with the State of Iowa.

E. BECAUSE THE IOWA SUPREME COURT'S HOLDING IS CONSISTENT WITH FEDERAL AND STATE APPELLATE DECISIONS, SUPREME COURT RULE 10 SUGGESTS DENIAL OF THIS PETITION.

As demonstrated above, the decisions of this Court and of state and federal appellate courts are consistent with the Iowa Supreme Court's holding. No appellate court addressing a set of facts similar to those present in these actions has found a lack of sufficient minimum contacts. Therefore, no special and important reasons exist for the exercise of judicial discretion in granting the writ and, pursuant to Supreme Court Rule 10, the petition should be denied.

II. THE CASES CITED IN THE PETITION ARE FACTUALLY DISSIMILAR FROM THESE ACTIONS AND FAIL TO SHOW ANY PURPORTED CONFLICT WITH THE DECISIONS OF THIS COURT OR CONFLICTS IN THE CIRCUITS.

In their petition, the dealers wrongfully rely on *Herman Miller v. MR.Rents, Inc.*, 545 F.Supp. 1241 (W.D. Mich. 1982), a trademark infringement and false advertising case wherein advertisements by the Illinois defendant in Chicago newspapers were held not to provide a sufficient basis for jurisdiction in a Michigan court. The court, in *Herman Miller,* reasoned that Michigan was not part of the defendant's intended market area, the "Chicagoland audience." *Id.* at 1245. Sales of the Chicago publications in Michigan constituted only 1.36% or less of the daily and Sunday circulations of those publications. 545 F.Supp. at 1243-1245. Even assuming that court's decision was correct, which may be questionable, here, sales of the Sunday *Omaha World Herald* in Iowa represent 11.5% of all sales of that newspaper. This is 8.5 times the percentage of the circulation of the Chicago newspapers into Michigan in *Herman Miller.* In addition, sales of the *Omaha World Herald* are received via subscription alone in nearly 30% of all Council Bluffs, Iowa households. The Council Bluffs-Omaha market is intentionally saturated with the dealers' advertising.

The dealers also wrongfully rely on *Mountainaire Feeds, Inc. v. Agro Impex S.A.*, 677 F.2d 651 (8th Cir. 1982). *Mountainaire Feeds* did not involve a defendant located on the border of the forum state soliciting sales in the forum. In addition, in *Mountainaire Feeds,* the plaintiff

relied greatly on facts which related to the plaintiff's unilateral performance of its contract with the defendant in the forum state. *Id.* at 655. In direct contrast, here, the State is not relying on any actions by the State or by Iowa residents. It is the dealers' own persistent advertising in Iowa which subjects them to Iowa jurisdiction.

Other cases relied on in the petition are also factually dissimilar. In *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988), and *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448 (8th Cir. 1984), although sufficient minimum contacts were not found, both cases involved defendants located in excess of one thousand miles from the forum state and each defendant had only a few tenuous contacts with the forum.

The dealers' reliance on *Berks v. Red Mountain Ski Corporation*, 571 F.Supp. 500 (N.D. Ill. 1983), is also misguided. In *Berks*, the Illinois plaintiff was required to meet the requirements of the Illinois long-arm statute by showing that the nonresident Wisconsin defendant's advertising in Illinois constituted "doing business" in Illinois. 571 F.Supp. at 501. No such showing is required of the State in these actions. The court, in *Berks*, specifically stated that it was *not* examining the defendant's contacts with the forum state "to the full extent the due process clause would allow." *Id.* Since the defendant's advertising was not sufficiently persistent, was the defendant's only Illinois contact, and had nothing to do with the plaintiff's claim, the court found that it lacked personal jurisdiction. *Id.* at 501-502. In addition, the business location of the defendant was more than 100 miles north

of the Illinois border. Therefore, *Berks* is nothing like the cases before this Court.

The dealers also mistakenly rely on *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982), wherein the court found that there was no evidence that the defendant newspaper had tried to develop a market in the forum state "beyond making the paper available to a few readers in the state . . . " 678 F.2d at 939. *Cox* was a libel suit filed in Alabama against an Atlanta, Georgia newspaper, and the court especially noted,

> "[f]irst amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity . . . an expansion of jurisdiction to the limits permitted by due process in other types of cases would tend to have a 'chilling' effect on the press because publishers would hesitate to distribute their newspapers in any areas other than those of their major circulation."

678 F.2d at 937-938.

This "greater showing" is not required in these cases since these are not libel actions and the defendants are retailers rather than publishers of newspapers.[10] Nothing in the petition to this Court suggests that the Iowa Supreme Court misapplied the decisions of this Court. The petition should be denied.

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[10] The various media in which the dealers' advertisements appeared are not parties to these actions. In addition, subsequent to *Cox*, this Court held that First Amendment concerns should not enter into the jurisdictional analysis. *Calder v. Jones*, 465 U.S. at 790.

III. THE IOWA SUPREME COURT CORRECTLY HELD THAT IOWA COURTS HAVE SUBJECT MATTER JURISDICTION OVER THESE CLAIMS.

In their petition, the dealers argue that Iowa courts lack subject matter jurisdiction of these actions. The Iowa Supreme Court rejected this argument, holding that Iowa courts clearly have subject matter jurisdiction of these claims in that they are based solely on Iowa law. *State v. Baxter,* 456 N.W.2d at 378.

A. IOWA COURTS HAVE SUBJECT MATTER JURISDICTION OF THESE ACTIONS UNDER THE IOWA CONSUMER CREDIT CODE.

In each action the State alleged that the advertisement in question violated the Iowa Consumer Fraud Act, Iowa Code § 714.16. For several of the advertisements addressed in each action, the State alleged that those advertisements also violated the credit advertising provisions of the Iowa Consumer Credit Code, Iowa Code Chapter 537 (hereafter "ICCC").[11]

In enacting the ICCC, the Iowa legislature was implementing the Uniform Consumer Credit Code (hereafter "UCCC"). A provision within the UCCC allows for the incorporation of the federal Truth in Lending Act, 15

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[11] On page 24 of their petition to this Court, the dealers falsely stated that "the entire complaint is based solely upon the Federal Truth in Lending Act ('TILA') and upon the purported allowance of Iowa's enforcement of the TILA." As stated above, each of the State's petitions includes allegations that certain advertisements violated the Iowa Consumer Fraud Act for which no allegations are made of TILA violations.

U.S.C. § 1601 et seq. (1987) (hereafter, "TILA"), into the UCCC, as part of state law. UCCC § 6.104(2), 1 Consumer Credit Guide (CCH) ¶ 6294 (1976). In the official comments concerning the UCCC's incorporation of the TILA, it was stated that the purpose of this incorporation was to conform state regulation of consumer credit transactions to the policies of the federal TILA. In order to gain an exemption under Section 123 of the TILA, state regulation substantially similar to that in the TILA must be enacted. Therefore, in order to allow for states to obtain exemptions from federal preemption under the TILA, the UCCC provided for incorporation of the entire Act. UCCC, 1 Consumer Credit Guide (CCH) ¶ 4775 (1976).

It is clear that the Iowa legislature adopted the UCCC position regarding incorporation of the TILA. Iowa Code § 537.6104 is nearly identical to Section 6.104 of the UCCC. In these cases, Iowa is enforcing its state consumer credit laws which incorporate provisions of the federal TILA into state law as part of the ICCC.

The federal TILA, 15 U.S.C. § 1610(a)(1)iii (1987), only preempts those state laws which are inconsistent with the federal Act, and only to the extent of the inconsistency. Only seven states have been ruled by the Federal Reserve Board to be preempted under the TILA; Iowa is not one of those states. FRB Official Staff Commentary § 226.28(a)-8 through -14.

In section 1610(a)(1) of the TILA, Congress specifically acknowledges the possibility of liability for violations of state truth-in-lending laws which are consistent with the federal Act. Here, the ICCC is completely consistent with the federal Act. Iowa Code § 537.1302 defines

the truth-in-lending provisions of the ICCC as being the federal Truth in Lending Act and its implementing regulations. Therefore, because a violation of the federal Truth in Lending Act is, by definition, a violation of the Iowa Consumer Credit Code, Iowa law is completely consistent with federal law and is not preempted.

In addition, caselaw authority interpreting section 1610(a)(1) makes it clear that Congress did not intend the federal remedy to be the exclusive remedy for violations of truth-in-lending laws. *Commercial Lawyers Conference v. Grant*, 65 Misc.2d 897, 318 N.Y.S.2d 966, 970 (N.Y. 1971); *Aldens, Inc. v. Ryan*, 454 F.Supp. 465, 474 (D.C. Okl. 1976), *aff'd* 571 F.2d 1159 (10th Cir. 1978); and, *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa.D.&C.3d 115, 128-131 (C.P. Mercer Cty. 1983) (failure to provide truth-in-lending rescission notice was a violation of state unfair deceptive acts and practices statute in action brought by state attorney general.)

B. THESE ACTIONS DO NOT UNCONSTITUTIONALLY INTERFERE WITH INTERSTATE COMMERCE.

In attacking the jurisdiction of this Court, the dealers have wrongfully argued that the State's actions are unconstitutional in that they unreasonably interfere with interstate commerce. In *Aldens, Inc. v. Thomas J. Miller*, 466 F.Supp. 379 (S.D. Iowa 1979), *aff'd* 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the Eighth Circuit held that when the Iowa Attorney General enforced the ICCC against an out-of-state mail order firm, there was no undue burden imposed on interstate commerce and no

violation of due process. "A state may regulate intrastate activities occurring in connection with interstate commerce and such legislation will not be subject to invalidation merely because of its incidental effect or indirect burden on interstate commerce." 610 F.2d at 539.

The dealers have attempted to distinguish *Aldens* by pointing out that *Aldens* involved state regulation of usurious interest rates, while these cases involve deceptive advertising. The dealers argue that the federal TILA requires uniformity with the federal Act in state regulation of advertising, where such uniformity was not required in the area of interest rates. The dealers are correct. However, as noted above, the Iowa Consumer Credit Code, by definition, is completely consistent with the federal TILA.[12] Under section 1610(a)(1)of the TILA, only those state regulations which are inconsistent with the federal Act are preempted by federal law. Iowa has honored the federal requirement of uniformity. Thus, there can be no finding of unconstitutional interference with interstate commerce under the *Aldens* analysis.

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[12] Under Iowa Code § 537.1302, "Truth in Lending Act," as referred to in the ICCC is defined as "title 1 of chapter 41 of title 15 of the United States Code, as amended to and including July 1, 1982, and includes regulations issued pursuant to that Act, prior to July 1, 1982. Iowa Code § 537.3201 states, in part, "A person upon whom the Truth in Lending Act imposes duties or obligations shall make or give to the consumer the disclosures, information and notices required of the person by that Act, and in all respects shall comply with that Act."

C. THE FEDERAL DISTRICT COURT HELD THAT THESE ACTIONS ARE NOT PREEMPTED UNDER THE FEDERAL TRUTH IN LENDING ACT; THE DEALERS MAY NOT INDIRECTLY APPEAL THAT DECISION TO THIS COURT.

In the federal court's Order denying the dealers' motions to reconsider the court's earlier Order of remand, the court held that the provisions of the federal TILA do not preempt state actions for violations of state truth-in-lending laws.[13] An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except civil rights actions brought pursuant to 28 U.S.C. § 1443. 28 U.S.C. § 1447(d). This Court should not allow the dealers to indirectly appeal the federal court's order of remand by arguing to this Court that the federal court should have found preemption.

IV. THE DEALERS' CONFLICT OF LAWS ARGUMENT IS NOT PROPERLY BEFORE THIS COURT.

The dealers incorrectly argue in their petition that a conflict exists between Nebraska and Iowa law and that the cases should be dismissed because Nebraska law applies. However, the Iowa Supreme Court correctly held that this is a conflicts of law question for the trial court to decide and does not go to the question of subject matter

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[13] Appendix M to this brief, page 4a.

jurisdiction. 456 N.W.2d at 378.[14] Therefore, whether Iowa courts must give "full faith and credit" to Nebraska law in the context of these cases is a question for the state district court to address in the first instance and is not an issue before this Court.[15]

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[14] It should be noted that no actual conflict exists between the Iowa Attorney General's Motor Vehicle Advertising Guidelines and Nebraska's law regarding motor vehicle advertising. An advertiser can easily comply with both Nebraska law and the Iowa advertising guidelines by drafting their advertisements so as to comply with the stricter law or guideline. The Iowa guidelines represent the enforcement position of the Iowa Attorney General and were provided to Iowa and Nebraska car dealerships prior to the circulation of the advertisements in question in these actions. The guidelines are attached to this brief as "Appendix O." Nebraska's motor vehicle advertising law is found in "Appendix F" to the petition.

[15] The dealers alleged in their Statement of the Case in their petition to this Court that they received the approval of the Nebraska Attorney General regarding the legality of the advertisements in question. Whether the Nebraska Attorney General approved the advertisements is a question of fact. Nothing in the facts alleged in the affidavits submitted by the dealers to the trial court refers to approval of advertisements by the Nebraska Attorney General. Therefore, it is improper for the dealers to raise this factual allegation for the first time to this Court. In addition, it is highly unlikely that the Nebraska Attorney General has the practice of approving the advertisements of any business, much less advertisements which violate the federal Truth in Lending Act.

CONCLUSION

For all the foregoing reasons, the petition in certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa, Plaintiff, vs. STAN OLSEN PONTIAC, INC., et al. Defendants.	)	CIVIL NO. 87-93-W Filed Dec. 27, 1988
and BAXTER CHRYSLER PLYMOUTH, INC., et al., Defendants.	)	CIVIL NO. 87-94-W
and JOHN MARKEL, INC., d/b/a Markel Ford, et al., Defendants.	)	CIVIL NO. 87-95-W
and JOHN KRAFT CHEVROLET, INC., d/b/a John Kraft Chevrolet-Isuzu, Inc., et al., Defendants.	)	CIVIL NO. 87-96-W

and	)	
	)	CIVIL
DEAN RAWSON NISSAN, INC., et al.,	)	NO. 87-102-W
	)	
Defendants.	)	

ORDER

This matter is before the court on defendants' motion to reconsider the court's order of July 13, 1988 remanding this case to the Iowa District Court. After careful consideration of all briefs and arguments presented in this case, it is the decision of this court that defendants' motion is denied, and the court sustains and readopts its order of July 13, 1988 remanding this case.

The court reminds all parties that although it remanded the case to Iowa District Court, it did render an opinion on the part of plaintiff's claim that relates to truth in lending. This court remains convinced that Congress did not give states or state officials standing to seek relief in federal court for violations of the Truth-in-Lending Act suffered by their citizens. Furthermore, Congress did not provide any private citizen with a cause of action to seek relief against advertisements which violate two of the three TILA provisions relied upon by the plaintiff. The plaintiff's complaint cites three sections of the TILA – §§ 1662, 1664 and 1667(c). Sections 1662 and 1664 – concerning credit advertising – were contained in part C (previously called Chapter 3) of the TILA. Section 1667(c) – concerning leasing advertising – was later added when part E was enacted in 1976. As the Eighth Circuit recognized in *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir. 1971), "it was the intent of Congress not to provide

private parties civil relief for violations of the credit advertising provisions [of part c]." 442 F.2d at 81. Indeed, the legislative history could not be more clear on this point:

> The bill specifically exempts credit advertising from the application of civil penalties. This exception has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties.

H. Rep. No. 1040, 90th Cong., 2d Sess. (1968), reprinted in the 1968 U. S. Code & Admin. News 1962, 1976.

The plaintiff has admitted it is not a "private party." Despite the fact that Iowa has adopted its own TIL law, Iowa authorities cannot exercise broader civil relief under their rule than was intended by Congress. In the court's July 12, 1988 order, the court noted that the congressional intent is less clear as it relates to the leasing advertising provisions under section 1667(c). The court stated at that time, however, that, as not all the cases involved leasing advertising, "[t]he minor federal interest in having a federal court resolve the legality of the leasing advertisements is not great enough to outweigh the impracticality of keeping three cases and sending two back to state court." (Court's July 12 Order at 9.) Therefore, the court ordered the entire case remanded.

Upon review of this matter, the court now believes it would be appropriate to clarify its opinion as it relates to the leasing advertising provisions of section 1667(c). The Eighth Circuit's decision In *Jordan v. Montgomery Ward,*

which clearly provided that private parties lacked standing to bring suit under the Act, was limited to the credit advertising provisions of the Act. *See Jordan*, 442 F.2d at 81. Section 1667(c), the section concerning leasing advertising, was not added to the Truth-in-Lending Act until 1976. Therefore, when *Jordan* was decided, the Eighth Circuit did not have in front of it section 1667(c). Therefore, when the *Jordan* court says "it was the intent of Congress not to provide private parties civil relief for violations of the credit advertising provisions [of part c]", it may be that the only reason they did not mention section 1667(c) is because it did not exist. These dates are significant. The principles behind the *Jordan* decision would likewise apply to section 1667(c). The question to ask is, is there some inherent difference in section 1667(c), in comparison with the other two sections, which would distinguish it, allowing the state to maintain a cause of action under this section of the Act, but not under any other sections of the Act? The court believes that there is nothing inherent about section 1667(c) which would distinguish it from the other sections. The principle underlying the Eighth Circuit's decision in *Jordan* is that Congress sought to preclude anybody, except those individuals who actually purchase a product because of the deceptive advertising or leasing provisions, to sue. The Congressional intent was to preclude the existence of private attorneys general from maintaining a suit under this Act. The leasing provisions under section 1667(c) is not such a different quality or directed at inherently distinguishable practices to dispel this congressional intent.

Defendants have further argued that the federal TILA provisions preempt state actions for TIL violations. This is not the law (*see* 15 U.S.C. § 1610(a)(1)).

The court denies the plaintiff's request for attorney fees and "costs" of litigation except that the clerk, as always, may review a bill of costs filed by the plaintiff and approve those costs deemed appropriate as in any other case. This case involved hard, close legal calls that the defendants had every right to pursue without any liability for "improvident removal."

IT IS THEREFORE ORDERED that defendants' motion to reconsider the court's order remanding this case is denied.

IT IS FURTHER ORDERED that the plaintiff's request for attorneys' fees and costs, except as set out above, are denied.

December 23, 1988.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

APPENDIX N

STATE OF IOWA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
AFFIDAVIT

STATE OF IOWA)
COUNTY OF POLK) ss:
)

I, Holly Merz, am a Consumer Protection investigator for the plaintiff State of Iowa. Being first duly sworn, under oath, I do state & depose that the following is true to the best of my knowledge and belief.

On March 15, 1989, I spoke by phone with Terry Aushenbaugh of the *Omaha World Herald*, telephone number 402-444-1000, and obtained the following information:

1) Current total sales of the Sunday edition of the *Omaha World Herald* consist of 288,779 editions, per Sunday.

2) Current total subscription sales of the Sunday edition of the *Omaha World Herald* consist of 257,082 papers, per Sunday.

3) Current total sales of the Sunday edition of the *Omaha World Herald* in the State of Iowa is 33,124.

Therefore, Iowa sales of the Sunday edition of the *Omaha World Herald* constitute approximately 11.5% of the total sales of that newspaper.

Further, affiant sayeth not.

Dated this 16th day of March, 1989.

/s/ Holly Merz
HOLLY MERZ

Subscribed and sworn to before me on this 16th day of March, 1989.

/s/ Kathern M. Smith
NOTARY PUBLIC

APPENDIX O

SEAL

DEPARTMENT OF JUSTICE

CONSUMER PROTECTION DIVISION

ADDRESS REPLY TO
HOOVER BLDG. SECOND FLOOR
1300 EAST WALNUT
DES MOINES, IOWA 50319
515-281-5926

ENFORCEMENT GUIDELINES

The Iowa Consumer Fraud Act (Iowa Code § 714.16(2)(a) (1985)) and Motor Vehicle Advertising

Revised February 1987

These guidelines were developed after extensive review of automobile advertisements in the State of Iowa. The Attorney General's Office will continue to monitor automobile advertising and additional guidelines will be added to this list, if necessary.

It is the position of the Consumer Protection Division of the Office of the Iowa Attorney General that to advertise motor vehicles by use of the following terms in the manner described constitutes a deceptive and misleading practice in violation of section 714.16(2)(a) and may subject the violator to suit by the Attorney General under section 714.16(7) of the Iowa Consumer Fraud Act. Under the Consumer Fraud Act, section 714.16(1)(a), "the term advertisement includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise."

Definitions

The following definitions apply to, and are a part of, the guidelines below.

(a) The term "dealer's cost" or words of similar import or meaning must refer to the actual cost to the dealer of any vehicle or part thereof delivered to the dealer's place of business. "Dealer's cost" or words of similar import do not include expenses incurred by the dealer such as flooring, overhead, commissions, dealer advertising, or other costs.

(b) The term "demonstrator" or words of similar import or meaning must refer to newer model motor vehicles which have been driven at least 1,000 miles by dealer employees or prospective customers of that or another dealership selling the vehicle.

(c) The term "driver education vehicle" refers to a new vehicle leased to or purchased by a school district for the main purpose of teaching students to drive.

(d) The term "excecutive vehicle" or words of similar import or meaning must refer to a vehicle which has been purchased directly from the manufacturer or subsidiary of the manufacturer and which has been used exclusively by the manufacturer, it subsidiary or by a dealer for its employees.

(e) The term "leased vehicle" or words of similar import refer to a vehicle which has been driven for a specific period of time under a lessor-lessee agreement.

(f) The term "newer model motor vehicle" refers to a motor vehicle which is of the current or previous model

year. For example, during the 1987 model year, this term would apply to 1986 and 1987 motor vehicles.

(g) The term "rental vehicle" refers to a vehicle which has been offered to the public for business or pleasure driving for short periods of time, usually on a daily or weekly basis.

Guidelines

1. An advertisement for a newer model motor vehicle which has been used as an executive vehicle or has been leased or rented on a fleet or individual basis:

(a) must clearly and conspicuously indicate in the advertisement that the vehicle has been previously driven; for example,

i) "DRIVEN AS AN EXECUTIVE VEHICLE"

ii) "DRIVEN AS A LEASED VEHICLE"

iii) "DRIVEN AS A RENTAL VEHICLE"

iv) "DRIVEN AS A DEALER DEMONSTRATOR"

v) "DRIVEN AS A DRIVER EDUCATION VEHICLE"

vi) "USED"

or, in the alternative, must clearly and conspicuously indicate the mileage of an individual vehicle or a range of mileage for a group of vehicles,

and

(b) may not use the terms "list price," "suggested list price," "current list price" or similar terms as a means of implying that the dealer's

current selling price represents a certain savings from "list price." However, the "list price" of the vehicle when the vehicle was new may be used in the advertisement by using the phrase "list when new. . . . "

2. An advertisement for a motor vehicle may not use the phrases "dealer's cost," "at cost" or similar terms unless the advertisement clearly and conspicuously provides to the dealer or in the alternative states that the dealer's profit on the vehicle is not limited to the amount of dollars charged over "dealer's cost."

Example: Dealer's cost may not reflect the actual cost to the dealer.

3. An advertisement for a motor vehicle may not use the phrases "over invoice" or "under invoice" or words of similar import unless the advertisement also clearly and conspicuously states that the dealer's profit is not limited to the amount of dollars charged over invoice.

Example: Invoice may not reflect actual cost to dealer.

Invoice may not reflect dealer holdback and/or incentives.

Notwithstanding the above, if the invoice is the actual price to the dealer and the dealer can substantiate this fact, no further disclosure is needed.

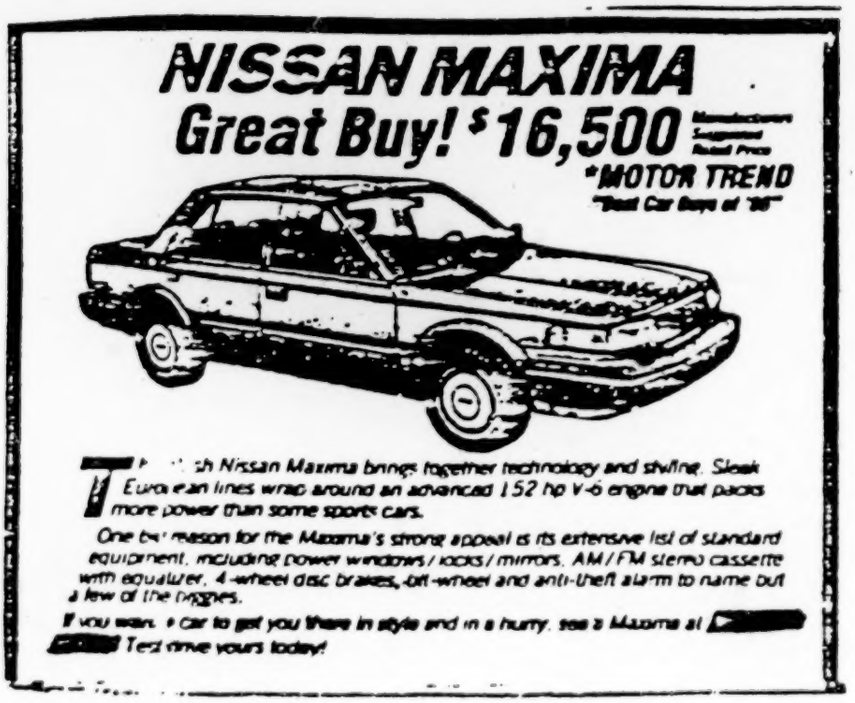
4. An advertisement for a motor vehicle may not advertise a certain dollar amount of savings or discount unless it clearly and conspicuously provides the basis for the savings or discount. In order for an advertised discount or savings to be offered from the advertiser's "former or regular price," "list price," or "manufacturer's

suggested retail price (MSRP)" the price indicated as a former or regular price, list price or MSRP must be an actual bonafide price at which the motor vehicle was regularly advertised and openly and actively offered to the public on a regular basis for a reasonably substantial period of time in the recent course of the advertiser's business.

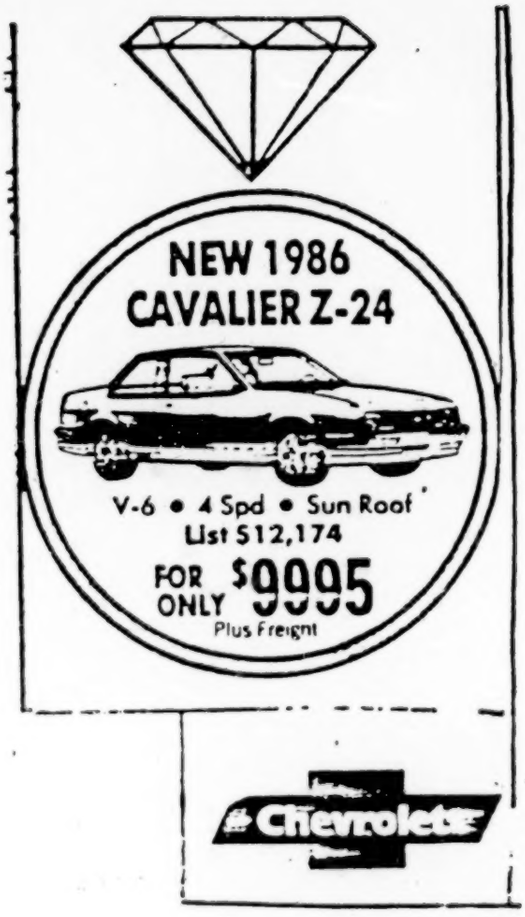
See Examples #1 and #2 – Attachment A for a correct use of list or MSRP as a benchmark or reference price.

See Example #3 – Attachment A for a questionable "Sale" advertisement.

5. No advertisement for a motor vehicle may advertise a "sale" as one of limited duration which will end on a particular date and then upon that date or shortly thereafter advertise that the same "sale" has been extended.



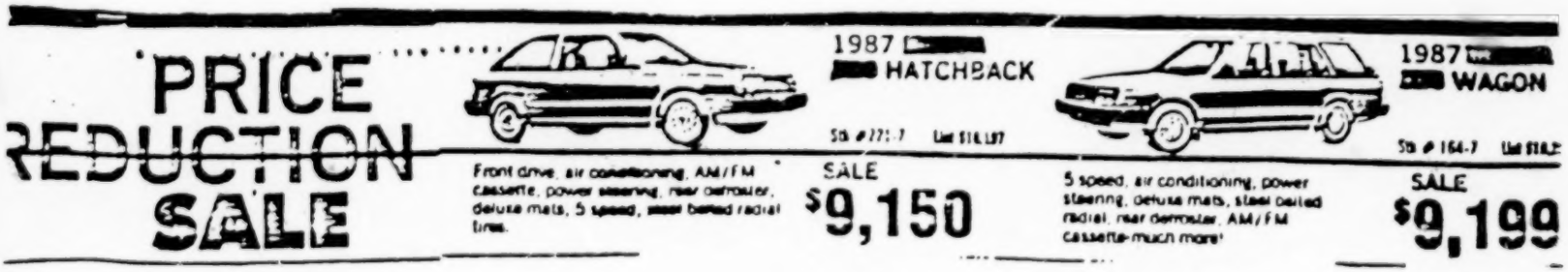
Example #1



Example #2

13a

CORRECT



Example #3

CORRECT – ONLY IF the vehicles were regularly offered for sale at the list price.